REMARKS

This amendment is in response to the Final Office Action dated February 19, 2009. Applicant has amended claims 1, 25, 30, 35, 36 and 54 and canceled claims 5, 34, 58 and 76-78. Claims 1, 6-25, 28-30, 35-54 and 59-75 are pending.

Interview Summary

Applicant would like to thank the Examiner for discussing the Office Action via telephonic interview on April 16, 2009. Examiner Ahmed and Applicant's representative, Mr. Matthew Gage, participated in the interview. During the telephonic interview, Applicant's representative reviewed the subject matter indicated by the Examiner as allowable, the objection to the drawings, and the rejection to the claims under 35 U.S.C. 112, second paragraph. The Examiner agreed to review proposed amendments to the claims and drawings. The Examiner also agreed to submit the amendments to both the drawings and the claims by way of Examiner's amendment pending review of the prior art.

Applicant would also like to thank the Examiner for discussing the Office Action via telephonic interview on May 4, 2009. Examiner Ahmed and Applicant's representative, Mr. Matthew Gage, participated in the interview. During the telephone interview, Applicant's representative discussed various issues surrounding independent claims 1, 25 and 28 identified by the Examiner when considering the proposed amendment submitted April 20, 2009. Applicant agreed to submit revisions to the proposed amendment to overcome these issues for further consideration by the Examiner.

Allowable Subject Matter

In the Final Office Action, the Examiner objected to claims 5–6, 34–36 and 58–59 as including subject matter that would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph. In this amendment, Applicant has amended claims 1, 30 and 54 so as to include all subject matter recited by the claims 5, 34 and 58, respectively. Applicant has also amended claim 25 in a manner similar to that of claim 1. As a result of these amendments, independent claims 1, 25, 30 and 54 include subject matter that the Examiner has indicated as allowable. Moreover, Applicant has addressed the rejection(s) under 35 U.S.C. 112, 2nd

paragraph and requests withdrawal of this rejection for reasons presented below. Accordingly, claims 1, 25, 30 and 54 and the claims dependent therefrom are in condition for allowance.

Claim Rejection Under 35 U.S.C. § 112

In the Final Office Action, the Examiner rejected claims 1, 5–25, 28–30, 34–54 and 58–78 under 35 U.S.C. 112, first paragraph, as being indefinite for failing to comply with the written description requirement. Applicant respectfully disagrees and submits that claims particularly point out and distinctly claim the subject matter, as required by 35 U.S.C. 112, second paragraph.

The Examiner indicated, as a basis for the rejection, that nowhere in the specification is found the limitation "dynamically determining a time epoch based on the loading condition by ... and transferring, at the dynamically determined time epoch, ..." (Emphasis Examiner's) The Examiner is apparently of the opinion that the Applicant's specification fails to provide written description support for the dynamic determination of the time epoch. In particular, previously, in the rejection, the Examiner noted that Applicant's specification specifically teaches that "Time epochs are dynamically determined based on the load of the downstream channel ..." (Emphasis Examiner's). The Examiner's rejection therefore appears to result from the fact that the specification does not recite ***verbatim***, dynamically determining a time epoch based on the loading condition by the specific steps of (i) computing a transmission time to deliver the amount of data in the transmit queue, (ii) computing a system load in units of time by comparing the transmission time to a constant lower limit and selectively setting the system load based on the comparison, and (iii) computing the time epoch based on the system load and a previous time epoch, as recited for example by Applicant's currently amended claim 1.

Applicant respectfully disagrees. First, Applicant's specification, as acknowledged by the Examiner, teaches to dynamically determining the time epoch. Thus, this establishes written description support for the dynamic determination of the time epoch. Second, Applicant's original, but now cancelled, claims 2-4 specifically recited that the time epoch was determined by the method denoted by steps (i), (ii) and (iii) now included in amended claim 1. MPEP 2163 Heading I. teaches that "It is now well accepted that a satisfactory description ***may be in the claims*** or any other portion of the ***originally*** filed specification." (Emphasis added.). In other words, the originally filed claims may provide support for themselves. In view of the specification's teaching to dynamically determining the epoch and originally filed claim 2-4 with

respect to the determination of the epoch (which have merely been moved up to claim 1), the specification clearly provides written description support that the time epoch can be dynamically determined based on the load condition by (i) computing a transmission time to deliver the amount of data in the transmit queue, (ii) computing a system load in units of time by comparing the transmission time to a constant lower limit and selectively setting the system load based on the comparison, and (iii) computing the time epoch based on the system load and a previous time epoch, as recited for example by Applicant's currently amended claim 1.

Consequently, Applicant submits that claims 1, 5–25, 28–30, 34–54 and 58–78 satisfy the written description requirement of 35 U.S.C. 112, first paragraph. As a result, these claims are not indefinite and withdrawal of all rejections under 35 U.S.C. 112 is requested.

Claim 5, 6 and 34-36

In the Final Office Action, the Examiner rejected claims 5, 6 and 34-36 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter of the invention. With respect to claims 5 and 6, Applicant respectfully disagrees with the rejection as, contrary to the Examiner's assertion, the language "selectively setting the system load" indeed appears in the base claim and, therefore, has proper antecedent basis. With respect to claims 34-36, Applicant has made amendments to overcome the rejection.

Specifically, with respect to claims 5 and 6, the Examiner stated that claim 1 does not include a limitation directed to selectively setting the system load. The Examiner then concludes that the recitation by claims 5 and 6 to the above limitation, which the Examiner states is absent from claim 1, results in claims 5 and 6 being indefinite for failing to particularly point out and distinctly claim the subject matter of the invention. Applicant's disagree.

Applicant's claim 1, as previously presented and now as currently amended, requires dynamically determining a time epoch based on the loading condition by (i) computing a transmission time to deliver the amount of data in the transmit queue, (ii) computing a system load in units of time by comparing the transmission time to a constant lower limit and ***selectively setting the system load based on the comparison***, and (iii) computing the time epoch based on the system load and a previous time epoch. Thus, the recital of claims 5 and 6 to "selectively setting the system load" is definite within the meaning of 35 U.S.C. 112, second paragraph.

As a result, withdrawal of the rejection is requested.

Claims 34-36

With respect to claims 34-36, Applicant has amended these claims in a manner that overcomes this rejection. In the rejection of these claims, the Examiner noted that these claims 34-36 are directed to a method when the base claim, i.e., claim 30, is directed to a device. Applicant has amended these claims to recite a device rather than a method, thereby overcoming the rejection under 35 U.S.C. 112, second paragraph. Given these amendments, withdrawal of the rejection is requested.

Claim Rejection Under 35 U.S.C. § 103

In the Final Office Action, the Examiner rejected claims 1, 7–19, 21–25, 28–30, 36, 38–48, 50–54, 60–64 and 66–78 under 35 U.S.C. 103(a) as being unpatentable over St. John (US 2002/0136200) in view of Takase et al. (US 2002/0154649). In the Final Office Action, the Examiner rejected claims 20, 49 and 65 under 35 U.S.C. 103(a) as being unpatentable over St. John (US 2002/0136200) and Takase et al. (US 2002/0154649) as applied to claims 1, 8, 11, 14, 17, 30, 37, 39, 43, 46, 54, 61 and 63 above, and further in view of the background of St. John. Applicant respectfully traverses the rejections to the extent such rejections may be considered applicable to the claims as amended. The applied references fail to disclose or suggest the inventions defined by Applicant's claims, and provide no teaching that would have suggested the desirability of modification to arrive at the claimed invention.

Applicant has amended claims 1, 25, 30 and 54 to include subject matter the Examiner indicated would be allowable in view of the above references. As a result, Applicant submits that these rejections are moot in view of the amendments.

Applicant has also canceled independent claims 76-78, thereby rendering the above rejections moot with respect to these claims as well.

For at least these reasons, the Examiner has failed to establish a prima facie case for non-patentability of Applicant's claims 1, 7–19, 21–25, 28–30, 36, 38–48, 50–54, 60–64 and 66–78under 35 U.S.C. 103(a). Withdrawal of this rejection is requested.

CONCLUSION

All claims in this application are in condition for allowance. Applicant respectfully requests reconsideration and prompt allowance of all pending claims. Please charge any additional fees or credit any overpayment to deposit account number 50-1778. The Examiner is invited to telephone the below-signed attorney to discuss this application.

Date: May 27, 2009

By: [signature]

SHUMAKER & SIEFFERT, P.A.
1625 Radio Drive, Suite 300
Woodbury, Minnesota 55125
Telephone: 651.286.8341
Facsimile: 651.735.1102

Name: Kent J. Sieffert
Reg. No.: 41,312